IN THE

# Supreme Court of the United States

No. 78-968

AKERS MOTOR LINES, INC. AND
AKERS-CENTRAL MOTOR LINES, INC.,

*Petitioners*

vs.

DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS TEAMSTERS LOCAL UNION NO. 71, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## INDEX


*Page No.*

THE OPINION OF THE COURT OF APPEALS AND THE ORDER OF THE DISTRICT COURT ..... 2

JURISDICTION ..... 2

QUESTION PRESENTED ..... 2

STATUTORY PROVISIONS INVOLVED ..... 3

STATEMENT OF THE CASE ..... 4

REASONS FOR GRANTING THE WRIT ..... 8

I. THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTER THE PRELIMINARY INJUNCTION, WHICH IRRECONCILABLY CONFLICTS WITH NATIONAL LABOR POLICY ..... 8

II. THERE WAS NEITHER ANY LEGAL BASIS NOR ANY EQUITABLE JUSTIFICATION FOR THE PRELIMINARY INJUNCTION IN THIS CASE ..... 20

CONCLUSION ..... 23


## CITATIONS

Cases:


*Amalgamated Trans. U., Div. 1384 v. Greyhound Lines*, 550 F. 2d 1237 (9th Cir. 1977) ..... 16

*Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 26 L. Ed. 2d 199, 90 S. Ct. 1583 (1970) ..... 18

Page No.

*Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397, 49 L. Ed. 2d 1022, 96 S. Ct. 3141 (1976) ..... 11, 14, 15, 19, 20

*Lever Bros. Co. v. Intern. Chemical Workers Union*, 554 F. 2d 115 (4th Cir. 1976) ..... 15

*Long Island R. R. Co. v. System Federation No. 156*, 368 F. 2d 50 (2nd Cir. 1966) ..... 21

Statutes:

28 U.S.C. §1254(1) ..... 2

29 U.S.C. §107(a)-(d) ..... 4, 21

29 U.S.C. §108 ..... 3, 10, 21

29 U.S.C. §§101-115 ..... 10

29 U.S.C. §173(d) ..... 3, 9

29 U.S.C. §185(a) ..... 3, 5



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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The Petitioners pray the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review a decision which that Court has rendered in a

case involving the parties above-named, and the Petitioners respectfully show to the Court:

### THE OPINION OF THE COURT OF APPEALS AND THE ORDER OF THE DISTRICT COURT

The Opinion of the Court of Appeals is reported at 582 F. 2d 1336. It also is set forth in the Appendix to this Petition.

The case came to the Court of Appeals upon cross appeals from an Order of the United States District Court for the Western District of North Carolina. The Order of the District Court is unreported but is set forth in the Appendix to this Petition.

### JURISDICTION

The Opinion of the Court of Appeals, embodying its decision, is dated September 19, 1978, and was entered on that date.

Jurisdiction to review, by Writ of Certiorari, the decision of the Court of Appeals is conferred on this Court by the provisions of 28 U.S.C. §1254(1).

### QUESTION PRESENTED

When parties are bound by a collective-bargaining agreement to resolve controversies thereunder by mandatory, final and binding arbitration, does not a District Court, under the decisions of this Court, clearly exceed its discretion and its jurisdiction over the subject matter when it accepts such controversies,



conducts a trial, receives evidence, makes substantive rulings and enters a sweeping injunction, while such controversies are in process of grievance and arbitration?

### STATUTORY PROVISIONS INVOLVED

The provisions of the Labor-Management Relations Act and of the Norris-LaGuardia Act, as amended, which are here pertinent, are as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."
>
> 29 U.S.C. §185(a)

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ."
>
> 29 U.S.C. §173(d)

> "No restraining order or injunctive relief shall be granted to any complainant . . . who has failed to make every reasonable effort to settle such dispute . . . with the aid of . . . voluntary arbitration."
>
> 29 U.S.C. §108

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . .;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law. . . ."

29 U.S.C. §107(a)-(d)

## STATEMENT OF THE CASE

Local 71[1] commenced this action by filing its Complaint in the United States District Court for the Western District of North Carolina, on March 10, 1978. The Union alleged that jurisdiction was con-

[1]Plaintiff and Appellant below, Drivers, Chauffeurs, Warehousemen and Helpers Teamsters Local Union No. 71, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "the Union").



ferred by §301 of the Labor-Management Relations Act.[1] The Complaint charged Akers-Central[2] with breaches of various provisions of labor contracts in an industry affecting interstate commerce, by engaging in certain leasing operations, allegedly intending to convert to non-union operations. As the Complaint further alleged, and as the Courts below have found and concluded, the alleged contract breaches were and remain subject to, and were and are to be resolved exclusively by, mandatory arbitration provisions of the applicable labor contracts. Accordingly, it was undisputed and is now determined that the alleged contract breaches shall, in no event, be resolved in the courts and that the District Court was and is without jurisdiction over the merits of the underlying labor disputes.

The Companies' Answer affirmatively asserted that the District Court lacked jurisdiction over the subject matter and, further, generally denied the allegations of the Complaint.

Approximately five months prior to filing its Complaint in the District Court, the Union had brought the first of two grievances complaining of the Companies' leasing operations. The Union admittedly had

[1]29 U.S.C. §185(a).

[2]Defendants and Cross-Appellants below, Akers Motor Lines, Inc. and Akers-Central Motor Lines, Inc. (hereinafter "the Companies").

knowledge of these operations for a period of two years before filing the initial grievance.

Simultaneously with the filing of its Complaint, the Union moved for a preliminary injunction to restrain the Companies from continuing alleged breaches of the labor contracts. The Union's Motion was the subject of a three-day trial, from April 17 through April 19, 1978. The District Court allowed the introduction of evidence pertaining to all aspects of the underlying labor disputes, in effect conducting a preliminary trial of the merits of the alleged contract breaches.

By the time of these proceedings in the District Court, both of the Union's grievances had already been heard by the proper first-level arbitral body, which had "deadlocked", or failed to agree upon decisions of the grievances. In such event, the labor contracts provided for presentation of the grievances to additional arbitral bodies established by the arbitration agreements. Both the first and the second grievances had been heard and now await final disposition by various arbitral bodies established by the contracts.

The Union, in the District Court, offered evidence that the Companies had laid off most of their union employees and had sold many of their operating assets. The Union argued that this evidence, coupled with the Companies' leasing of transportation equipment owned by non-union drivers, reflected an intent to convert to non-union operations and violated various provisions of applicable labor contracts.



The Companies' evidence tended to show that there was express contractual authorization for their leasing operations; that such operations and the Companies' sales of substantial assets had been necessitated by business and economic conditions, unprofitable operations and creditors' demands; that the Union had been aware of the Companies' leasing operations and sales of assets for two years prior to filing any grievance; and that the Companies had, in all respects, complied with the labor contracts.

On April 19, 1978, the District Court rendered an oral decision, specifying that certain injunctive requirements would be immediately in effect. Subsequently, on April 20, 1978, the District Court entered an Order enjoining the Companies "and their officers, agents, servants, contractees, divisions and subsidiaries, and all persons in active concert or participation with them . . . from directly or indirectly selling, disposing of or in any manner encumbering" any of the Companies' "capital assets" including "real property, terminals, equipment, tractors, operating rights and the like". Further, the District Court limited payments to the Companies' creditors and payments to their President. Payments of any dividends and all other distributions of earnings were absolutely forbidden, regardless of whether such payments were due or were to become due.

The Companies and the Union filed cross-appeals to the United States Court of Appeals for the Fourth

Circuit, which on September 19, 1978, rendered its Opinion. The Court of Appeals, although it criticized certain procedures employed by the District Court, "affirmed" the District Court's injunctive order.

## REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the Court of Appeals' decision is in conflict with a decision of the United States Court of Appeals for the Ninth Circuit, involves substantial questions of national labor policy which are both important and recurring, and is in direct contradiction to a recent decision of this Court, all as amplified below.

### I. The District Court Was Without Jurisdiction To Enter The Preliminary Injunction, Which Irreconcilably Conflicts With National Labor Policy

Both the Union's claims and the preliminary injunction entered by the District Court were predicated solely upon contractual undertakings between the Union and the Companies, set forth in collective-bargaining agreements. No other right on the part of the Union or its members, nor any other duty on the part of the Companies, was alleged, or cited by the Courts below, as ground or reason for the injunction in this case. Further, it is an established fact that any and all disputes and issues arising from the parties' contractual undertakings were to be resolved exclusively by mandatory, final and binding arbitration pro-



cedures set forth in the collective-bargaining agreements.

Accordingly, as indeed the Courts below held, the District Court neither had nor will have jurisdiction over the subject matter of the merits of the labor disputes between the Union and the Companies. The ultimate issues in those labor disputes are the arbitrable collective-bargaining agreement issues of whether the Companies are contractually prevented from engaging in their leasing operations and from engaging in orderly processes of business curtailment and partial liquidation, in order to remain in business. The courts will neither decide these issues nor fashion the remedies if any of these alleged breaches of the labor contracts are established through arbitration.

Congressional determinations of national labor policy, as enacted into law and as interpreted by this Court, peremptorily instruct that the courts shall not issue injunctions in labor disputes in such situations as this in which the District Court has erroneously intervened.

In §203(d) of the Labor-Management Relations Act, Congress unequivocally has stated:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ."
>
> 29 U.S.C. §173(d)

Expanding upon its declared preference for extra-judicial resolution of labor disputes, Congress also enacted the anti-injunction provisions of the Norris-LaGuardia Act,[1] which proscribe issuance of any injunctions in connection with many labor disputes. In most pertinent part, the Norris-LaGuardia Act provides:

> "No restraining order or injunctive relief shall be granted to any complainant . . . who has failed to make every reasonable effort to settle such dispute . . . with the aid of . . . voluntary arbitration."
>
> 29 U.S.C. §108

It is an uncontroverted fact that, for two years, the Union knew of the Companies' leasing operations and of their business curtailments and sales of assets, without filing a grievance contending that any of these activities violated any collective-bargaining agreement. This fact is material to the issue of equitable justification for the injunction and certainly demonstrates a failure of reasonable effort on the part of the Union to settle the underlying labor disputes through the contractually stipulated process.

The above-quoted Congressional pronouncements consistently have been interpreted, over a period of many years, to require that the courts refrain from exercising any jurisdiction where labor and management have agreed to resolve by arbitration all labor

[1] 29 U.S.C. §§101-115.



disputes arising from their collective-bargaining agreements. Such interpretations, which for a time arguably were not strictly applied by the lower courts, were forcefully reiterated by this Court's recent decision in *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397, 49 L. Ed. 2d 1022, 96 S. Ct. 3141 (1976).

In *Buffalo Forge*, this Court held that a sympathy strike could not be enjoined, notwithstanding the fact that such strike allegedly violated an explicit no-strike clause of the involved collective-bargaining agreement. The issue of whether the sympathy strike violated the involved labor contract was expressly held to be arbitrable. The Court's ruling, which referred to the Congressional enactments quoted above, was quite explicit—the courts are not to issue injunctions in relation to arbitrable labor disputes, either to prohibit alleged breaches of collective-bargaining agreements or to preserve the *status quo* pending arbitration.

> ". . . [T]he Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris-LaGuardia Act. In the course of enacting the Taft-Hartley Act, Congress rejected the proposal that the Norris-LaGuardia Act's prohibition against labor-dispute injunctions be lifted to the extent necessary to make injunctive remedies available in federal courts for the purpose of enforcing collective-bargaining agreements.

[Citation omitted.] *The allegation of the complaint that the Union was breaching its obligation not to strike did not in itself warrant an injunction. . . .*

*". . . It was for the arbitrator to determine whether there was a breach, as well as the remedy for any breach,* and the employer was entitled to an order requiring the Union to arbitrate if it refused to do so. But the Union does not deny its duty to arbitrate; in fact, it denies that employer ever demanded arbitration. However that may be, it does not follow that the District Court was empowered not only to order arbitration but to enjoin the strike pending the decision of the arbitrator, despite the express prohibition of §4(a) of the Norris-LaGuardia Act. . . . If an injunction could issue against the strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of §4. *The Court in such cases would be permitted, if the dispute was arbitrable, to hold hearings, make findings of fact, interpret the applicable provisions of the contract and issue injunctions so as to restore the status quo or to otherwise regulate the relationship of the parties pending exhaustion of the arbitration process.* This would cut deeply into the policy of the Norris-LaGuardia Act and make the courts



potential participants in a wide range of arbitrable disputes under the many existing and future collective-bargaining contracts, not just for the purpose of enforcing promises to arbitrate . . . but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator. . . .

"This is not what the parties have bargained for. . . . Nowhere do they provide for coercive action of any kind, let alone judicial injunctions, short of the terminal decision of the arbitrator. *The parties have agreed to submit to grievance procedures and arbitrate, not to litigate. They have not contracted for a judicial preview of the facts and the law.* Had they anticipated additional regulation of their relationships pending arbitration, it seems very doubtful that they would have resorted to litigation rather than to private arrangements. The unmistakable policy of Congress stated in §203(d), 29 U.S.C. §173(d), is: 'Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.' [Citation omitted.] But the parties' agreement to adjust or to arbitrate their differences themselves would be eviscerated if the courts for all practical purposes were to try and decide contractual disputes at the preliminary injunction stage.

". . . It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly preempted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted. Injunctions against strikes, even temporary injunctions, very often permanently settle the issue; and in other contexts time and expense would be discouraging factors to the losing party in court in considering whether to relitigate the issue before the arbitrator.

*"With these considerations in mind, we are far from concluding that the arbitration process will be frustrated unless the courts have the power to issue interlocutory injunctions pending arbitration in cases such as this or in others in which an arbitrable dispute awaits decision."* [Emphasis supplied.]

*Buffalo Forge Co. v. Steelworkers, supra,* 428 U.S. at 409-412

The dissenting Justices in *Buffalo Forge* suggested that a sympathy strike might be enjoined, as a refusal to submit to arbitration. The dissent, however, did not argue that the courts generally could enter injunctions against or in respect of alleged breaches of labor contracts.

To the contrary, the dissenting Justices expressly made note of the "general rule" that



"the party seeking arbitration is usually required to accept the condition of which he complains pending the decision of the arbitrator" . . . [,] "[a] rule [which] has its origins in the need for production to go forward under the employer's control pending clarification of the agreement through arbitration."

*Buffalo Forge Co. v. Steelworkers, supra,* 428 U.S. at 427, n. 21

Thus, it is respectfully submitted that this Court unanimously agreed that injunctions may not issue in relation to alleged breaches of collective-bargaining agreements, either to prohibit the alleged breaches or to maintain the *status quo.*

Indeed, even if the Union in this case had shown, which it certainly did not show, that the Companies refused to arbitrate, the *Buffalo Forge* decision teaches that the District Court would have been without jurisdiction to enter the preliminary injunction herein.

". . . [Assuming refusal to arbitrate,] it does not follow that the [court is] empowered not only to order arbitration but to enjoin [the alleged contract breach] pending the decision of the arbitrator. . . ."

*Buffalo Forge Co. v. Steelworkers, supra,* 428 U.S. at 410

The Courts below relied upon *Lever Bros. Co. v. Intern. Chemical Workers Union,* 554 F. 2d 115 (4th

Cir. 1976). Petitioners respectfully submit that the *Lever Bros.* decision and the decisions below herein are in direct conflict with this Court's *Buffalo Forge* decision. These Fourth Circuit decisions also are in conflict with a decision of the United States Court of Appeals for the Ninth Circuit. As was the case in *Amalgamated Trans. U., Div. 1384 v. Greyhound Lines*, 550 F. 2d 1237 (9th Cir. 1977), there was, in the present case, "neither an express nor implied in fact promise by [the employer] to preserve the *status quo*".

Additionally, this case is distinguishable from *Lever Bros.* In stark contrast to the *Lever Bros.* facts, the Companies herein have been engaged in their leasing operations since 1975. For nearly three years, the Companies have been forced to navigate a course of business curtailment and of partial liquidation which, as uncontradicted evidence established, was charted by factors beyond their control. In contrast to Lever Brothers' voluntary election to move a plant, the Companies' inexorable business curtailment and partial liquidation were involuntarily commenced more than three years ago, as a result of business and economic conditions and unprofitable operations over which the Companies had no control.

For two years, the Union was aware of the Companies' leasing operations and of their sales of assets before it filed any grievance alleging any breach of any collective-bargaining agreement. Then, some five



months later, with its claims against the Companies under way in grievance procedure, the Union filed this suit in the District Court. In the months and years preceding the present Court action, the Companies had been building their leasing operations, upon which numerous people now depend for their livelihoods and which have generated revenues that have been and can be applied to payment of debts. Additionally, by the time the Union sought injunctive relief, the Companies had sold virtually all of their transportation equipment, had sold all but four terminals, had lost many customers and had only a few union employees.

No injunction in this case could have or can restore a *status quo ante*, in which the Companies engage in no leasing operations but engage in operations utilizing union employees. There are no properties with which to engage in such operations. The injunction prohibiting continuing sales of unused and unusable assets can only restrict the Companies' ability to remain in business. The injunction cannot benefit the Union or its members, either by preserving assets with which to engage in transportation operations utilizing Union members or by assuring payments of the Union's members' claims for various benefits. The Companies' remaining assets, as the District Court found, have been completely encumbered and furnish no security for payment of benefits to which the Union's members may be entitled.

Attempting to establish a legal theory for injunctive relief in this case, the Union leveled the accusation that the Companies "failed to agree . . . to have the grievances processed and heard in accordance with the contract". Yet the District Court itself found that the Union's grievances were already underway and that the primary grievances had already been heard before the proper arbitral body. The Courts below did not, and indeed could not, find that the Companies refused to arbitrate the grievances. The Companies were and are without any means to refuse "to permit", or in any manner prevent, arbitration. As the District Court found, an absolute right to one continuance was specifically available to each of the parties to the agreement to arbitrate. The Companies exercised that right only.

It is suggested that the Union alleged a "failure to agree" to arbitration in an attempt to furnish a jurisdictional theory for the injunction entered below. The *Boys Markets*[1] doctrine, which the Union disingenuously sought to apply, is that, in certain very narrow circumstances, a *strike* over an arbitrable grievance may be enjoined pending arbitration. This Court's decision was founded upon a union's agreement to refrain from striking as the *quid pro quo* for the employer's agreement to submit grievances to binding arbitration. This Court's conclusion was that when

[1]See *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 26 L. Ed. 2d 199, 90 S. Ct. 1583 (1970).



there existed an agreement to arbitrate, rather than to strike over, a grievance, national labor policy permitted an injunction against *breach* of the agreement to arbitrate. The *Boys Markets* doctrine was based entirely upon alleged breach of the arbitration agreement itself and did not authorize injunctions against other alleged breaches of collective-bargaining agreements.

The foregoing argument is sustained by this Court's recent decision in *Buffalo Forge Co. v. Steelworkers, supra*, holding that alleged contract breaches, other than an implicit breach of an agreement to arbitrate, cannot preliminarily be enjoined. This Court observed that injunctions in respect of other alleged breaches would involve the courts

> ". . . in a wide range of arbitrable disputes under the many existing and future collective-bargaining contracts, not just for the purpose of enforcing promises to arbitrate, which was the limit of Boys Markets, but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator . . . ."
>
> *Buffalo Forge Co. v. Steelworkers, supra*, 428 U.S. at 410-411

Under *Boys Markets*, the court's jurisdiction is founded upon implicit refusal to arbitrate. There has been no such refusal in this case.

Finally, even if the Companies had refused to arbitrate,

> ". . . it does not follow that the [court is] empowered not only to order arbitration but to enjoin [the alleged contract breach] pending the decision of the arbitrator. . . ."
>
> *Buffalo Forge Co. v. Steelworkers, supra*, 428 U.S. at 410

**II. There Was Neither Any Legal Basis Nor Any Equitable Justification For The Preliminary Injunction In This Case**

Even if the District Court had subject-matter jurisdiction, its preliminary injunction exceeded legal authority and contravened statutory and equitable principles. The sweeping mandatory and prohibitory injunction herein was imposed upon allegations of breaches of collective-bargaining agreements. Although it was suggested that the Companies' assets were being "dissipated", uncontradicted and uncontested evidence established that all the Companies' assets were pledged or mortgaged as security for bank loans, which were in default from 1975 forward. Every sale of assets by the Companies was made upon demand of secured creditors in lieu of formal foreclosure proceedings. There was not a scintilla of evidence that a single penny realized from sales of assets was applied other than to reduction of secured indebtedness, benefiting all unsecured creditors, including



the Union and its employee members. There was absolutely no evidence that any sales of assets or distributions of proceeds have been wrongful.

To the contrary, there was uncontradicted evidence that the Companies were forced to proceed with orderly processes of partial liquidation and of curtailment of their businesses, in order to discharge massive secured debts and to avoid bankruptcy. In these circumstances, including those mentioned in the preceding section of this Petition, there was no equitable justification for any injunctive relief.

In addition to the criteria set forth at 29 U.S.C. §107(a)-(d), it also has been held, consistent with the ordinary principles of equity, that the Norris-LaGuardia Act, at 29 U.S.C. §108, imposes a requirement of "clean hands", that "every reasonable effort" be made to resolve a labor dispute by arbitration.[1]

Upon the facts of this case, the Union was without "clean hands", and the evidence did not satisfy either statutory or equitable criteria for the issuance of injunctive relief.

Beyond having failed, for two years, even to initiate arbitration, the Union also was without "clean hands" in its assertions that sales of assets, including operating authority, should be enjoined so that transportation operations utilizing union employees might be

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[1] *Long Island R. R. Co. v. System Federation No. 156*, 368 F. 2d 50 (2nd Cir. 1966).

resumed. On or about April 14, 1978, the International Union, "on behalf of affiliated local unions and their members", filed a Complaint with the Interstate Commerce Commission, seeking an "investigation . . . looking toward suspension and revocation" of all of the Companies' operating authority. It thus appears that the Union's purposes have been to put the Companies out of business. The Union represented to the District Court that protection of its members required an injunction against any and all sales of operating authority. Its parent organization then asserted to the Interstate Commerce Commission that all such operating authority should be absolutely and irrevocably forfeited. These actions demonstrate that the request for an injunction against any sales of operating authority was made in bad faith, not for the purpose of assuring that such authority could be employed in transportation operations utilizing union employees, but for the purpose of assuring that the Companies could not even receive a fair price for the authority, with which they might discharge obligations to their creditors.

As mentioned above, there was substantial evidence that the Companies have not breached the collective-bargaining agreements. Further, uncontradicted facts dictated that an injunction would inflict far greater injury upon the Companies, their employees and their creditors than would have been inflicted upon the Union if the injunction were not granted.



The Union's long delay in seeking injunctive relief demonstrated that "substantial and irreparable" injury to the Union was not a factor. Lastly, the demonstrated facts were that no Union member could return to work if further sales of assets were enjoined.

The Companies respectfully submit that, upon review of the decisions herein, this Court should conclude that not only did the District Court exceed its proper jurisdiction in issuing its injunction in this case, but that neither did it give heed or effect to uncontradicted and uncontested evidence bearing upon the statutory and equitable criteria for issuance of injunctions in cases arising out of labor disputes.

## CONCLUSION

Upon all of the foregoing, the Petitioners earnestly pray the Court for a Writ of Certiorari, directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which has been rendered by that Court in the present case.

Respectfully submitted,

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J. W. ALEXANDER, JR.
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# APPENDIX

## INDEX TO APPENDIX


| | *Page No.* |
|---|---|
| Opinion Of The United States Court of Appeals | 1a |
| Order Of The United States District Court | 21a |

# United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 78-1254

DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS TEAMSTERS LOCAL UNION No. 71, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

*Appellee,*

v.

AKERS MOTOR LINES, INC. AND AKERS-CENTRAL MOTOR LINES, INC.,

*Appellants.*

No. 78-1286

DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS TEAMSTERS LOCAL UNION 71, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

*Appellants,*

v.

AKERS MOTOR LINES, INC. AND AKERS-CENTRAL MOTOR LINES, INC.,

*Appellees.*

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued: July 20, 1978 Decided: September 19, 1978

Before WINTER, Circuit Judge; FIELD, Senior Circuit Judge, and HALL, Circuit Judge.

Hugh J. Beins (Jonathan G. Axelrod; Francis M. Fletcher on brief) for Appellant; J. W. Alexander, Jr. (Blakeney, Alexander & Machen; Kennedy, Covington, Lobdell & Hickman on brief) for Appellees.

HALL, Circuit Judge:

The issue presented in this appeal is whether a federal court may enjoin an employer, who is in the process of partially liquidating his business, from further encumbering capital assets pending resolution of ongoing arbitration of grievances filed by the union. The district court held that, on the facts of this case, injunctive relief was proper to maintain the *status quo*. We affirm.

Akers Motor Lines, Inc. and Akers-Central Motor Lines, Inc. [hereinafter "Akers-Central"] are a joint



employer signatory to some six labor contracts[1] with Drivers, Chauffeurs, Warehousemen and Helpers Teamsters Local Union No. 71 [hereinafter "Local 71"]. The collective bargaining agreements contain no-strike and no-lockout provisions, and call for mandatory grievance and arbitration procedures.[2]

Akers-Central is engaged in the business of interstate haulage of various commodities. Before 1975, most of these commodities [hereinafter "general com-

[1]Akers-Central and Local 71 are signatories to the National Master Freight Agreement, effective from April 1, 1976 to March 31, 1979. This Master Agreement contains three supplements: the Carolina Freight Council Over-the-Road Supplemental Agreement, covering road drivers; the Carolina Freight Council City Cartage Supplemental Agreement, covering city employees; and the Carolina Freight Council Automotive Maintenance Supplemental Agreement, covering maintenance employees. It also contains the Eastern Conference Area Iron & Steel Rider, exempting steel and "special commodity" items, see p. 4, *infra*, from the purview of the Master Agreement. Akers-Central and Local 71 are also signatories to the Carolina Area Office Clerical Agreement, effective from May 1, 1977 to April 30, 1980, covering clerical employees, and the Building Maintenance Agreement, effective from March 1, 1976 to February 28, 1979, covering janitors.

[2]The grievance procedure detailed in the National Master Freight Agreement provides for a three-tier system composed of the Carolina Bi-State Committee, the Eastern Conference Joint Area Committee, and the National Grievance Committee. At each step in the grievance procedure either party is permitted one delay. A deadlock on an issue at any level requires a hearing at the next level, then remand for hearings on any unresolved issues remaining.

modities"] were hauled by Local 71 employees in tractors and trailers owned by Akers-Central, and handled by Local 71 employees in terminals owned by Akers-Central. The employer, however, could not profitably haul "special commodities," notably steel, using union employees, so a "Steel Rider" to the Over-The-Road Supplemental Agreement specifically exempted these items from the collective bargaining agreement negotiated by the union. In 1975 Akers-Central began an expanded special commodities operation, and Local 71 negotiated a "Special Commodity Rider" which limited the definition of special commodities to include only steel and refrigerated commodities which could be hauled on flatbed trailers or refrigeration vans.

Subsequently, Akers-Central's chief negotiator was fired and Victor DeMaras, president of the company, repudiated the Special Commodity Rider; no supplanting agreement has ever been negotiated, but DeMaras did give Local 71 his commitment that no van-type trailers would be used in the special commodities operation.

From 1975 to 1977 Akers-Central continued to expand the special commodities operation while simultaneously cutting back on the general commodities operation. In October, 1977, Akers-Central began to liquidate the general commodities division. It sold most of its tractors and trailers, then leased them for use in the special commodities operation, sold or



leased most of its terminals, and sold (subject only to final approval from the Interstate Commerce Commission) some of its interstate operating rights. By February, 1978, it had laid off all but two of its approximately twelve hundred Local 71 employees, while hiring one hundred sixty-six non-union road drivers.[3] In the spring of 1978, the special commodities operation had grossed $1,000,000 in one four-week period. Local 71 alleges that this is a calculated scheme on Akers-Central's part to freeze out the union; it alleges that the special commodities operation is simply the general commodities operation in disguise. Akers-Central counters by terming its layoff of all but two Local 71 employees "tragic," but says that liquidation of the general commodities division was a legitimate response to adverse business conditions.

Local 71 had already initiated its first grievance on September 29, 1977, requesting that Akers-Central be ordered to cease and desist the special commodities operation and to compensate all Local 71 employees already laid off for lost earnings. This grievance was prompted by the discovery that a special commodities trailer was hauling general commodities, namely rugs. On February 20, 1978, the union filed another grievance requesting the same relief, when another special

[3]There is evidence that approximately four to six of these drivers are covered by a labor contract with a local union in New York City.

commodities tractor was found to contain general commodities. Finally, on March 1, 1978, Local 71 filed five additional grievances, alleging that Akers-Central had violated the Master Agreement by failing to pay earned vacation monies to road drivers, city employees, maintenance employees, office employees, and janitorial employees.

On March 10, 1978, Local 71 filed a Complaint and Motion for Preliminary Injunction against Akers-Central. A three-day trial was held, with Local 71 presenting nine witnesses and some seventy exhibits, and Akers-Central presenting two witnesses and ten exhibits. The district court issued a preliminary injunction and, after a subseqent hearing, finalized the injunction. The district court found, *inter alia*, that the grievances were arbitrable, that Local 71 and the employees it represented would suffer more from denial of injunctive relief than Akers-Central would from its grant, and that preservation of the *status quo* was necessary to prevent irreparable harm to Local 71. *See Lever Brothers Co. v. International Chemical Workers Union, Local 217*, 554 F.2d 115, 119 and n.6 (4th Cir. 1976). The court also found substantial likelihood of recovery by Local 71 on the grievances. The court, however, refused to issue an order for expedited arbitration, finding that the grievances were already before the arbitrator and any delays were inherent in the system which the parties had negotiated for and agreed upon. Finally, included in the district court's order was a provision which allowed the evidence



developed through discovery at the court hearing to be used by the arbitrator. Akers-Central's request for a modification of this portion of the order was denied.

Local 71 filed an appeal, challenging the district court's refusal to order expedited arbitration, and its maintenance of the *status quo* at the time the injunction issued, rather than restoration of the *status quo ante* at the time the first grievance was filed. Akers-Central cross-appealed, contending that the injunction was improper because it violated the rule of *Buffalo Forge Co. v. United Steelworkers of America*, AFL-CIO, 428 U.S. 397 (1976), and because it encroached upon the exclusive statutory jurisdiction of the Interstate Commerce Commission.

## I. The Injunction

Three cases cast a long shadow over our consideration of whether injunctive relief was appropriate to "freeze" further encumbrance of an employer's capital assets pending resolution of grievance arbitration: *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970); *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, supra;* and *Lever Brothers Co. v. International Chemical Workers Union, Local 217, supra.* An analysis of these decisions—their holdings, their rationales, and their interrelationship—is necessary to our determination that this injunction is not violative of the Norris-LaGuardia Act, §4, 29 U.S.C.A. §104.

In *Boys Markets*, the Supreme Court analyzed the history of federal labor contract law and concluded that, given the increased importance of arbitration as an instrument of federal policy for resolving labor-management disputes, 398 U.S. at 242-43, Norris La-Guardia did not prohibit the issuance of an injunction against a strike called in response to grievances which were subject to mandatory arbitration. The Court characterized its holding as a "narrow" one, *id.* at 253, and suggested guidelines adopted from *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting).

> "A District Court entertaining an action under §301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury



> to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance."

*Id.* at 254 (emphasis in original).

A proposed extension of *Boys Markets* was considered and rejected in *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, supra*. There, the activity sought to be enjoined was a sympathy strike; the employer contended that *Boys Markets* was controlling. The Supreme Court disagreed.

> "*Boys Markets* plainly does not control this case. The District Court found, and it is not now disputed, that the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; . . ."

428 U. S. at 407 (emphasis in original).

Thus a clear distinction was drawn between a strike called in response to an arbitrable grievance, and a sympathy strike, where there is no underlying dispute between the parties to be resolved by arbitration.

This court had occasion to consider *Boys Markets* and *Buffalo Forge* in the case of *Lever Brothers Co. v. International Chemical Workers Union, Local 217, supra*. There, the union sought to enjoin the employer from permanently transferring its plant from Balti-

more, Maryland, to Hammond, Indiana, pending resolution of grievance arbitration. We affirmed the grant of injunctive relief. The critical facts of Lever Brothers were these:

> "Had the district court not preserved the *status quo*, [by enjoining the relocation] Lever Brothers would have *permanently transferred* their plant from Baltimore, Maryland, to Hammond, Indiana. If the union then prevailed in the arbitration, they would have had a double burden to satisfy—first, to convince the company that it should not have moved the plant to Hammond, Indiana— a *fait accompli*, and then it would have had the burden to convince the company to move the plant back to Baltimore, Maryland. The arbitration in this sense would undoubtedly have been 'but an empty victory' for the union."
>
> 554 F.2d at 122 (emphasis in original).

We distinguished the case of *Amalgamated Transit Union, Division 1384 v. Greyhound Lines, Inc.*, 550 F.2d 1237 (9th Cir. 1977) ("*Greyhound II*"), relied upon by the employer:

> "In *Greyhound Lines*, the issue concerned a change of work schedules for existing employees who were employed by a bus line. Whether or not Greyhound was permitted to unilaterally alter the work schedules of its employees under the collective bargaining agreement, the employees would still be employed, and still earn wages albeit on different schedules. In his award, the arbitrator *could* subsequently alter pay schedules or revise the work schedules depending on whether he found for the union or the company and return the parties to substantially the *status quo ante*.
>
> In the instant case, had there not been an injunction pending arbitration to preserve the *status quo*, the employees at the Baltimore plant *would have been totally and permanently deprived of their employment . . .*"
>
> *Id.* (emphasis in orignal). *Compare Hoh v. Pepsico, Inc.*, 491 F.2d 556, 560 (2d Cir. 1974).

Thus, the distinction emerged:

> "An injunction to preserve the *status quo* pending arbitration may be issued either against a company or against a union in an appropriate *Boys Markets* case where it is necessary to prevent conduct by the party enjoined from rendering the arbitral process a hollow formality in those instances where, as here, the arbitral award when rendered could not return the parties substantially to the *status quo ante*."
>
> *Id.* at 123.

This narrow holding was consistent with the underlying rationale of *Buffalo Forge*, that the process of arbitration is preferred and the jurisdiction of the arbitrator is to be protected. The lynchpin of *Buffalo*

*Forge* was the Court's finding that the sympathy strike at issue would not frustrate the arbitration process. The lynchpin of *Lever Brothers* was our finding that relocation of the plant would have precisely that effect.

We now consider the facts of the instant case. Local 71 has filed seven grievances, two challenging whether Akers-Central has violated the Master Agreement by hauling general commodities in the guise of special commodities, and five concerning vacation monies alleged to be due. These facts indicate that *Boys Markets* is controlling, since there are underlying issues to be resolved by arbitration; however, the parties hotly dispute whether the employer's liquidation of part of the business is a *response* to those disputes, in the sense of a *Boys Markets* strike, or rather an independent action necessitated by business conditions.

We think that our analysis in *Lever Brothers* makes this factual dispute legally insignificant. In *Lever Brothers*, we held that a "runaway employer" could be enjoined pending resolution of arbitration, notwithstanding his motives, where failure to enjoin could render the arbitration process a "hollow formality." 554 F.2d at 123. The compelling circumstances of *Lever Brothers* are present in this case. If Akers-Central is allowed to continue its process of liquidation and disposition of assets, any victory by the union at the arbitration table may be meaning-



less. If the remaining terminals and vehicles are sold, there will be no jobs for re-assignment to Local 71 employees. If assets from ongoing operations are encumbered, there will be no fund from which to pay vacation monies. "[T]he arbitral award when rendered could not return the parties substantially to the *status quo ante*." *Id.* Therefore, we hold that the grant of injunctive relief in this case was proper.

### II. The District Court's Fact-Finding

We conclude that the district court improperly made findings of fact on the merits of the grievances, and improperly refused to issue an order restricting use of the evidence developed through discovery at the hearing on the injunction in the subsequent arbitration proceedings. The district court found that its original order allowing such use of the record was "essential unless the proceeding before the arbitrators is to be conducted upon a policy of ignorance rather than upon a policy of relevant information."

Again we look to *Buffalo Forge* and *Lever Brothers*. In *Buffalo Forge*, the Court's refusal to extend the holding in *Boys Markets* reflected a concern that the federal courts could, in an attempt to protect the arbitrator's jurisdiction, actually encroach upon that jurisdiction.

> "This would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes . . .

not just for the purpose of enforcing promises to arbitrate, which was the limit of *Boys Markets*, but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator . . . ."

420 U.S. at 410-11.

"But this would still involve hearings, findings, and judicial interpretations of collective-bargaining contracts. It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly preempted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted . . . ."

*Id.* at 412.

The implication is clear for the issue before us. Courts must avoid reaching the merits of arbitrable disputes; their function, within the narrow ambit of *Boys Markets* and *Lever Brothers*, is to make a determination that the underlying issues may be arbitrable, and preserve the *status quo* so that the arbitrators can first decide this preliminary issue, and then, if appropriate, decide the merits. When a collective bargaining agreement contains a mandatory arbitration clause, it reflects the parties' desire to arbitrate, not to litigate, grievances.

The court below held hearings and made findings of fact as to the arbitrable issues, as a concomitant to



its determination that Local 71 satisfied the first prerequisite to the issuance of injunctive relief: a likelihood that it would prevail on the merits. But the district court misconstrued that requirement. *See United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960). We held in *Lever Brothers* that " '. . . a plaintiff . . . need only establish that the position he will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor. If there is a genuine dispute with respect to an arbitrable issue, the barrier [to the issuance of an injunction] we believe appropriate[ly sic] has been cleared . . . . ' " 554 F.2d at 120, citing *Amalgamated Transit Union, Division* 1384 *v. Greyhound Lines, Inc.*, 529 F.2d 1073, 1077-78 (9th Cir. 1976) ("Greyhound I"). [4]*Contra, Hoh v. Pepsico, Inc.*, 491 F.2d at 561.

Inasmuch as the court below went too far—holding an extended hearing, developing evidence on the grievances, and making findings of fact—we find that he overstepped the limits defined in *Lever Brothers*. Incident to this, we also disapprove that portion of the district court's order which allows evidence de-

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[4]The Ninth Circuit subsequently reconsidered and reversed its opinion, 550 F.2d 1237 (9th Cir. 1977), finding it to be in conflict with *Buffalo Forge*. As previously stated, however, we find the result in Greyhound II to be distinguishable, and find that the instant language in Greyhound I is still persuasive.

veloped at the court hearing to be used in subsequent grievance proceedings. The function of gathering and evaluating evidence is for the arbitrator. The parties agreed to this mechanism when they negotiated the mandatory grievance procedures. It is not for the courts to re-write the collective bargaining agreement.

We find it unnecessary, however, to reverse and remand for correction of this portion of the order, inasmuch as the evidentiary proceedings on all grievances have been completed. In fact, we note that all of the grievances were before the arbitrators at the time the Complaint was filed in district court. Therefore, we find that any prejudice flowing from the district court's order is minimal, and decline to halt the grievance proceedings at this late stage.

### III. Request for Expedited Arbitration and Restoration of the *Status Quo Ante*

Local 71 took its appeal in this case to protest the district court's refusal to order, as a concomitant to its order granting an injunction, expedited arbitration on the pending grievances.[5] The court based its refusal on the terms of the collective bargaining agreement itself: the parties had negotiated and agreed upon the present system of arbitration, with its built-in poten-

[5] All grievances were already before the arbitrator; Local 71's concern was the slow, three-tier system of evaluation and review.



tial for delay. Therefore, the court refused to, in effect, re-write the terms of that agreement. We agree with the court's conclusion that a "hands-off" approach was mandated. As the Supreme Court has said, in a context slightly different, "[o]therwise, the employer would be deprived of his bargain and the policy of the labor statutes to implement private resolution of disputes *in a manner agreed upon* would seriously suffer." *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. at 407 (emphasis added).

Likewise, we find no error in the district court's refusal of Local 71's request to restore the *status quo ante*—the *status quo* as of September, 1977, the time at which the Union filed its first grievance. Local 71 defines *status quo* as the " 'last uncontested status which preceded the controversy. . . .,' " citing *National Association of Letter Carriers, AFL-CIO v. Sombrotto*, 449 F.2d 915, 921 (2d Cir. 1971) (dictum) (citations omitted). But the Second Circuit termed this a "general rule," and went on to add that ". . . these generalities, like 'canons' of statutory construction, cannot be mechanically applied." *Id.* Here, the district court apparently considered the "controversy" to have begun upon the filing of the Complaint, rather than upon the filing of the first grievance. We cannot say that this determination was clearly erroneous in the district court's exercise of its discretion to fashion equitable relief.

In addition, the occurrences between September, 1977, and March 10, 1978, make restoration of the *status quo ante* a virtual impossibility. Tractors and trailers have been sold, as have terminals; jobs have been irreparably lost. Finally, we think that the district court correctly refused to compel Akers-Central to utilize union drivers, in order of seniority, in the special commodities operation whose validity is the subject of two of the grievances now in arbitration. To do so would, in effect, prejudge the grievances, *see Westinghouse Electric Corp. v. Free Sewing Machine Co.*, 256 F.2d 806, 808 (7th Cir. 1958), and prejudice the rights of non-union drivers employed by Akers-Central.

**IV. Interstate Commerce Commission Jurisdiction**

Akers-Central contends that the injunction, which enjoined Akers-Central "and their officers, agents, servants, contractees, divisions and subsidiaries, and all persons in active concert or participation with them" from "selling, disposing of or in any manner encumbering" Akers-Central's assets, was intended to enjoin consummation of the executory contracts between Akers-Central and Smith's Transfer Corporation ("Smith's") and Arkansas-Best Freight, Inc. ("Arkansas-Best") for the sale and purchase of interstate operating authority. We do not read the injunction to have this effect.

In October and December, 1977, the Interstate Commerce Commission authorized temporary use of the



operating rights in question by Smith's and Arkansas-Best. Final approval of the sale will be given or denied after completion of litigation before the Commission. The Interstate Commerce Commission has jurisdiction to authorize or prohibit sales of operating authority, 49 U.S.C. §5(2), and this jurisdiction is exclusive, 49 U.S.C. §5(12). Here, the I.C.C. has already exercised its jurisdiction to grant temporary use of the operating rights; it is exercising its jurisdiction to hold hearings on the proposed sale; it may exercise its jurisdiction to grant or deny final consummation of the executory contracts. If it does in fact grant final authority to sell, Akers-Central may apply to the district court for a modification of the injunction to reflect these actions. In the meantime, Akers-Central is not enjoined from performance of the executory contracts, but is rather enjoined from prospective encumbrance of its assets. In other words, it may not enter into new executory contracts, and it is enjoined from disposing of the proceeds from those contracts already entered. We see no interference with the jurisdiction of the I.C.C. to proceed to a final determination and grant or deny finalization of the contracts with Smith's and with Arkansas-Best.

*Chicago South Shore and South Bend Railroad v. Monon Railroad*, 235 F. Supp. 984 (N.D. Ill. 1964), relied upon by Akers-Central, is inapposite. There plaintiff railroad sought to enjoin defendants from making further purchases of stock in plaintiff railroad, until the I.C.C. could determine the legality of

the acquisition. The court held that the I.C.C. had exclusive jurisdiction to determine whether the transfer of control was lawful. Similarly, in the instant case, we do not question the exclusive authority of the I.C.C. to determine the issue of whether the executory contracts may be finalized, and we do not attempt to enjoin Smith's or Arkansas-Best from utilizing the temporary authority which the I.C.C. has granted.

Therefore, the decision of the district court is

AFFIRMED



IN THE

# United States District Court

FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

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|---|---|
| DRIVERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS TEAMSTERS LOCAL UNION No. 71, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Plaintiff*, *vs.* AKERS MOTOR LINES, INC. AND CENTRAL MOTOR LINES, INC., *Defendants.* | Civil Action No. C-C-78-0087 |

**ORDER GRANTING PRELIMINARY INJUNCTION**

The Complaint was filed in this matter on March 10, 1978. An evidentiary hearing was held April 17 through April 19, 1978. The Court, having considered the testimony, the exhibits and the written and oral argument of counsel, grants the application for a preliminary injunction as set forth herein.

**FINDINGS OF FACT**

1. Akers Motor Lines and Central Motor Lines (Akers/Central) are joint employers operating as common carriers in the trucking industry, pursuant to authority granted by the ICC.

2. For many years, Akers/Central and Teamsters Local Union 71 (Union) have been parties to collective bargaining agreements covering the employer's Charlotte, North Carolina and Florence, South Carolina terminals. These labor agreements have been referred to as the National Master Freight Agreement, the Carolina Freight Council Over-the-Road Supplemental Agreement, the Carolina Freight Council City Cartage Supplemental Agreement, the Carolina Freight Council Automotive Maintenance Supplemental Agreement, the Carolina Area Office Clerical Agreement and the Building Maintenance Agreement.

3. The collective bargaining agreements contain no-strike and no-lockout provisions and mandatory grievance and arbitration provisions.

4. In 1974, Local 71 represented some 1,200 employees of Akers/Central who were covered by the aforesaid labor agreements. By the end of 1977, the number of employees of Akers/Central, represented by Local 71, had been reduced to approximately 200. In February, 1978, Akers/Central laid off all remaining Union employees except for 2 individuals and closed all of its terminals. Meanwhile, under Article



63 of the contract, Akers/Central has continued to operate a so-called Special Handling or Special Commodities Division and by February, 1978, there were some 166 drivers in this Division. None of these drivers are represented by Local 71 and, except for at most 12, none are represented by any union or covered by any collective bargaining agreement.

5. In September, 1977 and February, 1978, Local Union 71 filed grievances alleging that Akers/Central was operating its Special Commodities Division in violation of the collective bargaining agreements. On March 1, 1978, Local 71 filed grievances alleging that Akers/Central has failed and refused to give vacation pay to its employees as required by the labor agreements.

6. The September grievance has been deadlocked on a procedural issue by the joint employer-union grievance committee and the February grievance has been deadlocked on the merits by said committee in a hearing which was held on April 13, 1978. Under the procedure of the collective bargaining agreements, these grievances are to be referred to the Eastern Conference Joint Area Committee and may not be heard for many months.

7. The vacation pay grievances have not been heard to date with but one exception, and the reason for the delay has been that the employer has exercised its rights under the labor agreements to obtain one delay. The one vacation pay grievance which was heard was

decided by the Carolina Piedmont Joint Employer-Union Grievance Committee on March 23, 1978, which awarded vacation pay to the (four or less) employees involved. Akers/Central has not complied with this grievance decision and has not paid the vacation monies.

8. There is substantial evidence that Akers/Central is operating in violation of the collective bargaining agreements and Local 71 has demonstrated a reasonable likelihood of success in its grievances. The companies have closed all of their terminals and laid off all but 2 union employees, many of whom have 20 and 30 years seniority. At the same time, Akers is operating with some 166 drivers of whom only 12 drivers at most are covered by a labor agreement (the validity of which is challenged by the plaintiff) with Teamsters Local Union 707 in New York City. The agreement with Local 707 on its face restricts the type of commodities that may be hauled for Akers/Central Special Commodities Division, but in practice the defendant companies admit that they are hauling any and all truckload shipments which they can find. A substantial portion of these truckload shipments were the type of cargo formerly hauled by employees of Akers/Central represented by Local 71 and covered by Local 71's collective bargaining agreements.

9. Akers/Central's agreement with Local 707 is being attacked before the NLRB with the assertion that it has not been approved in accordance with the National Master Freight Agreement, does not reflect the desire of the special commodity drivers to be represented by Local 707, and is not being observed by Akers/Central.



10. Akers/Central's records reflect that it owes vacation pay to laid-off employees, represented by Local 71, in a sum exceeding $200,000, and there is no apparent reason why these monies should not be paid. Akers/Central had gross revenues in excess of $1 million for the third four-week period in the year, 1978.

11. Akers/Central is in default to the Central States Southeast and Southwest Pension Fund in an amount in excess of $400,000. Akers/Central was making payments on this obligation at the rate of $10,000 per week until late February, 1978, when it stopped payment on its latest check and discontinued payments to the Fund because the Fund trustees would not agree to a 12-month moratorium on this obligation.

12. There is a serious danger that unless injunctive relief is granted the plaintiff and the union employees will be irreparably injured and the employees may never receive any monies which may be owed to them under the collective bargaining agreements. Akers/Central has sold almost all of its tractors and trailers. It has also sold most of its terminals and it is attempting to sell valuable operating rights in Georgia to Smith's Transfer Corporation for $2.5 million and other valuable rights between Raleigh, N. C.

and New York City to Arkansas Best Freight, Inc. for $800,000. Most, if not all of the companies' equipment, property and assets are secured by a group of banks, including the First National Bank of Boston, which (acting for itself and a group of banks, including North Carolina National Bank) also insisted upon the said moratorium by the Pension Fund trustees as a condition for payment of vacation benefits due and owed under the said agreements with Local 71.

13. The plaintiff Local 71 (aside from one postponement has attempted to arbitrate the aforesaid grievances; Akers/Central has delayed the grievance hearings whenever possible.

14. The defendants' President has made vague and unspecified claims of debts allegedly due and payable to him by the defendants in sums in excess of $1,000,000.00.

UPON THE FOREGOING FINDINGS
THE COURT CONCLUDES:

1. The grievances filed by Local 71 are arbitrable in accordance with the mandatory grievance provisions of the respective collective bargaining agreements.

2. Under ordinary principles of equity, Local 71 and the employees it represents will suffer far more from the denial of an injunction than will the defendants Akers/Central from its issuance.



3. Unless the status quo is preserved, the employees of Akers/Central represented by Local 71 and Local 71 will be irreparably injured.

4. There is a substantial likelihood of recovery on the merits of the special commodities grievances, by Local 71, under the collective bargaining agreements, based upon the evidence adduced upon this hearing and in accordance with Local 71's "run-away employer" theory. Clearly these grievances are not futile or frivolous.

5. There is a substantial likelihood of recovery on the merits of the vacation pay grievances, by Local 71, under the collective bargaining agreements upon evidence adduced at this hearing. These grievances likewise are not futile or frivolous.

6. Local 71 and its members are entitled to an injunction to preserve the status quo and to prevent a dissipation of assets pending a final resolution of all pending grievances.

WHEREFORE, pending further order of this Court and in order to prevent further liquidation and dissipation of assets of the defendants while allowing normal operation of the trucking business of the defendants, it is ORDERED:

1. That effective at 12:15 p.m. on April 19, 1978, the defendants and their officers, agents, servants, contractees, divisions and subsidiaries, and all persons in active concert or participation with them,

are hereby enjoined pursuant to Rule 65 of the Rules of Civil Procedure from directly or indirectly selling, disposing of or in any manner encumbering any of the capital assets, tangible or intangible, of the defendants and their divisions and subsidiaries. "Capital assets" includes, but is not limited to, such things as real property, terminals, equipment, tractors, trailers, operating rights, and the like. The collection of accounts due through factoring or other arrangements and the purchase and sale of the things normally bought and sold in the every day operation of the trucking business, and the usual and ordinary payments and advances to drivers, employees and agents are not restricted by this order.

2. No dividends or distributions of earnings or capital, due or to become due, shall be made.

3. No payment of debts allegedly owed to the defendants' President, Victor DeMaras, including unpaid salary, shall be made to him out of the assets of the defendants. The total compensation of Mr. DeMaras *before* taxes and deduction, from defendants shall not exceed $120,000 a year.

4. No accelerated payments shall be made to any officer, employee, agent, shareholder or creditor (secured or unsecured), including the First National Bank of Boston and North Carolina National Bank, out of the assets of the defendants.

5. The plaintiff shall post a bond in the sum of $100,000, pursuant to Rule 65(c) of the Federal Rules



of Civil Procedure, which bond shall be security for the payment by it of such costs and damages as may be incurred or suffered by the defendants should it later be finally determined by this Court, by the United States Court of Appeals for the Fourth Circuit, or by the United States Supreme Court, that the defendants have been wrongfully enjoined or restrained.

6. Within 10 days after entry of this Order, the defendants Akers and Central shall furnish to the Clerk of this Court the names and mailing addresses of the Bi-State and Piedmont Grievance Committees, the Eastern Conference Joint Area Grievance Committee, the International Brotherhood of Teamsters, the Central States Southeast-Southwest Health, Welfare and Pension Fund, S. Dean Hamrick, Esquire (attorney for the said fund), Ray S. Farris, Esquire (attorney for the Hayes family), the First National Bank of Boston, North Carolina National Bank, Smith's Transfer Corporation, Arkansas Best Freight, Inc., and of all creditors and other persons, corporate and individual, having claims against the defendants and either of them in the sum of $5,000.00 or more; and the Clerk of this Court shall, upon receipt of such information, mail to each of the said grievance committees, attorneys, banks, creditors and others as named, a copy of this Order Granting Preliminary Injunction.

7. The basic purpose of this order is to prevent further liquidation and dissipation of assets of defendants, but to allow normal operation of the trucking business.

UPON MOTION of the plaintiff, it is further ordered that the Court's protective Order dated April 6, 1978, be modified so that the plaintiff Local 71, its representatives and attorneys, may use the documents obtained from the defendants in this action for the purpose of the grievance committee proceedings now pending, and under the same restrictions set out in the original order.

IT IS FURTHER ORDERED that the plaintiff's Motion to Amend the Complaint, filed herein, be and the same is hereby allowed, and that the Complaint be deemed amended accordingly.

This the 20th day of April, 1978.

JAMES B. MCMILLAN
*United States District Judge*